SUPREME COURT, U. S.

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-746

COMMISSIONERS AND DIRECTOR OF CIVIL SERVICE FOR THE COMMONWEALTH OF MASSACHUSETTS,
PETITIONERS,

v.

BOSTON CHAPTER, N.A.A.C.P., INC., ET AL., AND THE UNITED STATES OF AMERICA,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENTS BOSTON CHAPTER, N.A.A.C.P., INC., ET AL., IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Opinions Below

The opinions of the Court of Appeals, dated September 18, 1974 and November 8, 1974, are reported at 504 F.2d 1017 (1st Cir. 1974) Pet. App. A. p. 21; App. B. p. 42. The opinion of the District Court, dated February 8,

1974, and a supplemental order, dated February 11, 1974, are reported at 371 F. Supp. 507 (D. Mass. 1974) Pet. App. C. p. 46; App. D. p. 75. The supplemental order entered by the District Court on March 6, 1974 is not reported, and appears in the Petition at Appendix E, page 76.

Jurisdiction

The judgments of the Court of Appeals were entered on September 18, 1974 and November 8, 1974. The Petition for Writ of Certiorari was filed on December 16, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

1. Whether the courts below properly found that the firefighter entrance examination administered on a statewide basis had adverse impact on minorities, was not shown to be significantly related to successful job performance, and was therefore unlawful.

2. Whether the District Court, as affirmed by the Court of Appeals, abused its discretion in ordering that qualified minorities be certified for hiring on an accelerated basis to overcome the present effects of past discrimination.

3. Whether the Court of Appeals, in light of the Eleventh Amendment, properly taxed the costs of appeal against a state official.

Constitutional Provisions

The constitutional provisions involved in this case are the Fifth, Eleventh and Fourteenth Amendments to the United States Constitution.

The Fifth and Fourteenth Amendments to the United States Constitution, in pertinent part, appear at page 3 of the Petition.

The Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Statutes and Rules

42 U.S.C. § 1981, provides in pertinent part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . .

42 U.S.C. § 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 2000 e-2(a) provides:

> It shall be an unlawful employment practice for an employer —
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

The *Equal Employment Opportunity Commission Guidelines on Employee Selection Procedures*, 29 C.F.R. § 1607 et seq., in pertinent part, appear at page 4 of the Petition.

Rule 39 (a) of the Federal Rules of Appellate Procedure provides in pertinent part:

> . . . if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered . . . .

Statement of the Case

This is a class action, filed on October 4, 1972 by the Boston Chapter, N.A.A.C.P., Inc. and by twelve Black and one Spanish-surnamed persons on behalf of Black and Spanish-surnamed persons who seek a firefighter position in any of the fire departments under the jurisdiction of Massachusetts civil service law. The Attorney General of the United States filed a similar action on January 24, 1973, and the two actions were consolidated on July 18, 1973.

Plaintiffs sought declaratory and injunctive relief pursuant to 42 U.S.C. §§ 1981, 1983, to redress discriminatory recruitment and hiring practices by the members of the Massachusetts Civil Service Commission, the Director of

Civil Service, and the Commissioner of the Fire Department of the City of Boston. Plaintiffs alleged that the defendants have engaged in a policy and practice of discriminating against the plaintiffs on account of their race, color and/or national origin, in that the defendants' standards and procedures in the recruiting and hiring of firefighters unlawfully favor non-Spanish-surnamed white persons and tend to exclude, limit, and otherwise discourage plaintiffs' employment in fire departments subject to Massachusetts civil service law. Specifically, plaintiffs alleged that Black and Spanish-surnamed persons have been denied rights secured to them by the Fourteenth Amendment to the United States Constitution by the defendants' recruitment practices, and by the civil service firefighter entrance examination (FFEE hereinafter).

The district court held a seven-day evidentiary hearing in July and September, 1973. The hearing commenced as a hearing on motions for a preliminary injunction but, with respect to the FFEE issue, was subsequently consolidated with the trial on the merits. On February 8, 1974 the district court entered an opinion and order. Pet. App. C. p. 46.[1]

The district court found that the FFEE administered in 1971 by the defendant Massachusetts Division of Civil Service only excluded 44% of the Caucasian candidates but excluded 61% of the Black and Spanish-surnamed applicants. Experts called by both sides testified that Black and Spanish-surnamed persons typically perform less well on tests like the FFEE. The district court also found that the FFEE was not professionally developed. Finally, the district court found that there was a substan-

[1] The hearing was limited to the testing and recruitment issues. The court deferred to a later date consideration of the remaining issues in the case, relating to the use of arrest and conviction records, a mandatory swim test, and a high school diploma requirement.

tial disparity between the racial composition of the five major cities of Massachusetts and the racial composition of the fire departments serving those cities. For example, the district court found that the combined minority population of the City of Boston may exceed 23% but less than one percent (18) of the 1,983 firefighters are Black or Spanish-surnamed. Pet. App. C. pp. 48-56, 63. The record showed that since 1960 the Boston Fire Department has appointed 805 firefighters, of whom six are Black and two are Spanish-surnamed. Pet. App. A. p. 39, n. 17. The district court ruled that the plaintiffs had established a *prima facie* case of racial discrimination and that the defendants had the burden of justifying the use of the test. Pet. App. C. p. 56.

In anticipation of this burden the petitioners had engaged an expert to conduct a validation study to determine whether the FFEE was predictive of successful job performance. This expert testified that he found positive correlations between test scores and the successful completion by firefighters of two job tasks; namely, putting on a gas mask and removing a hose from the back of a truck. Based on his study this expert concluded that FFEE was job-related. Pet. App. C. pp. 57-63. The district court found that the correlations found in the validation study "were only minimally significant" and that they "represent only a fraction of those duties a firefighter encounters". The district court concluded that the study "does not constitute 'convincing' evidence of job relatedness". Pet. App. C. p. 63.

The district court also found that the recruitment practices of the Boston Fire Department unlawfully excluded Black and Spanish-surnamed applicants. Pet. App. C. p. 67.

On February 8, 1974 the district court entered its Opinion and Decree, holding that the FFEE discriminates

against Black and Spanish-surnamed persons. The district court enjoined the Civil Service defendants from administering entrance examinations which have not been validated in accordance with the *Equal Employment Opportunity Commission Guidelines on Employee Selection Procedures*, 29 C.F.R. § 1607 et seq. (*EEOC Guidelines* hereinafter).

The district court ordered the Civil Service defendants to authorize provisional appointments from the current eligibility list, and to rank first on the next eligibilty list for permanent appointments those persons who receive provisional appointments. All persons on the next eligibility list will be certified for permanent appointment on a one-for-one basis with any Black or Spanish-surnamed person who failed a previous FFEE and who passes a valid FFEE;[2] on a one-for-one basis with any other Black or Spanish-surnamed person who passes a valid FFEE and seeks appointment to the Boston or Springfield Fire Department; and on a three-for-one basis with any other Black or Spanish-surnamed person who passes a valid FFEE and seeks appointment to a fire department serving a community whose minority population is more than one percent, until such time as the fire department achieves a complement of minorities commensurate with the percentage of minorities living within the community. Pet. App. C. pp. 69-74.

The district court ordered the Civil Service defendants to affirmatively recruit Black and Spanish-surnamed persons for future firefighter entrance examinations. It issued a preliminary injunction against the defendant Fire Commissioner for recruitment practices that discriminated

[2] The Decree does not affect the right of an appointing authority to decline to hire a candidate on the eligibility list or to terminate a firefighter during the six-month probationary period. In addition, all applicants must also satisfy certain other entrance requirements, including a rigorous physical fitness test and medical examination.

against Black and Spanish-surnamed persons, and ordered him to affirmatively recruit Black and Spanish-surnamed persons. Pet. App. C. pp. 71-72. The defendant Fire Commissioner did not appeal from the Opinion and Decree of the district court. However, the Civil Service defendants did appeal.

On September 18, 1974 the court of appeals affirmed the Opinion and Decree of the district court. On November 8, 1974 the court of appeals awarded the N.A.A.C.P. plaintiffs their costs of appeal, in the amount of forty-nine dollars and fifty cents ($49.50).

On December 16, 1974 the Attorney General for the Commonwealth of Massachusetts, purportedly on behalf of the petitioners, filed in this Court a Petition for a Writ of Certiorari.[3]

Reasons For Denying the Writ

I. The Decision of the Court of Appeals Comports With the Decisions of this Court and the Decisions of the Other Circuit Courts.

A. *The Courts Below Properly Found That the Respondents Established a Prima Facie Case of Racial Discrimination.*

In finding a *prima facie* case of discrimination the courts below based their conclusion on three factors:

First, the 1971 FFEE was found to have had an adverse impact on Black and Spanish-surnamed applicants.

[3] On December 5, 1974 the Massachusetts Attorney General informed the Massachusetts Supreme Judicial Court, in oral argument in an unrelated case, that the Director of Civil Service and the majority of the members of the Massachusetts Civil Service Commission had voted to oppose a request for review by this Court of the Opinion of the court of appeals, but that he intended to seek review despite the wishes of his clients.

Only 13 of the 33 applicants, or 39%, who identified themselves as Black or Spanish-surnamed passed the examination. On the other hand, 1737 of the 3089 Caucasians, or 56%, passed the examination. Pet. App. A. p. 24, n. 3. Although these statistics showed a disparity, the courts below did not rely solely on these statistics because of the small size of the minority pool of candidates, *Ibid.*

Second, the record reflected a tremendous disparity between the racial composition of certain fire departments and the communities served by said fire departments. For example, although the combined minority population of Boston is probably close to 23%, less than one percent of Boston's firefighters is Black or Spanish-surnamed. The evidence with respect to four other cities with substantial Black and Spanish-surnamed populations also showed disparities. Pet. App. A. p. 24; App. C. p. 56.

Third, the testimony from experts called by *both sides* established that Black and Spanish-surnamed candidates typically perform more poorly than Caucasians on the type of tests administered to firefighter candidates. Pet. App. A. pp. 26-27.

Based on the above findings, which were not controverted, the courts below properly held that the respondents established a *prima facie* case of racial discrimination and, therefore, determined that the petitioners had the burden of justification, and had to "prove that the disproportionate impact was simply the result of a proper test demonstrating lesser ability of black and hispanic candidates to perform the job satisfactorily". *Vulcan Society* v. *Civil Service Commission*, 490 F.2d 387, 392 (2d Cir. 1973). This ruling is consistent with decisions of this Court and of the Circuit Courts of Appeals which have had occasion to consider the issue.

This Court has ruled that "[i]f an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited". *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971). With respect to employment tests, this Court in *Griggs* required "that any tests used must measure the person for the job and not the person in the abstract". *Id.* at 436. Thus, when a job requirement is found to have a significant adverse impact on minority group applicants, this Court has placed on the employer the burden of showing that any given requirement "bear[s] a demonstrable relationship to successful performance of the jobs for which it was used". *Id.* at 431.

In addition, this Court has recognized that in many cases it is proper to infer discriminatory impact from racial statistics, *Mayor of the City of Philadelphia* v. *Educational Equality League*, 415 U.S. 605, 620 (1974). And in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), this Court noted that "[t]he District Court may, for example, determine, after reasonable discovery that 'the [racial] composition of defendant's labor force is itself reflective of restrictive or exclusionary practices' ", at p. 805, n. 19. *In accord: United States* v. *Ironworkers, Local 86*, 443 F.2d 544, 551 (9th Cir. 1971), *Cert. denied*, 404 U.S. 984 (1971); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421, 426 (8th Cir. 1970); *Erie Human Relations Commission* v. *Tullio*, 493 F.2d 371, 373, n. 4 (3rd Cir. 1974); *U. S.* v. *Chesapeake and Ohio Ry. Co.*, 471 F.2d 582, 586 (4th Cir. 1972); *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245, 247 (10th Cir., 1970), *Cert. denied*, 401 U.S. 954 (1971); *Associated General Contractors of Mass., Inc.* v. *Altshuler*, 490 F.2d 9, 18, n. 15 (1st Cir. 1973), *Cert. denied*, 416 U.S. 957 (1974).

B. *The Petitioners Failed to Demonstrate that the Firefighter Entrance Examination Was Predictive of Successful Job Performance and, Therefore, Failed to Satisfy Their Burden of Proof.*

In an effort to satisfy their burden of justifying the use of the FFEE, the petitioners offered the testimony of an expert witness who testified that he conducted a "concurrent validation" study and that his findings demonstrated that the FFEE was predictive of successful job performance as required by the *EEOC Guidelines*. After carefully examining the evidence, both courts concluded that the petitioners had not demonstrated that the test was "in fact substantially related to job performance". Pet. App. C. p. 63; App. A. pp. 33-37. The petitioners now seek, in effect, to persuade this Court that these findings were erroneous. However, it is well settled that where both courts below are in agreement as to the facts, those findings should be considered binding by this Court. *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, 214 (1948).

In an effort to distinguish this case from the *Comstock* case, the petitioners attempt to frame the issue as an issue of law rather than an issue of fact. Accordingly, the petitioners contend that the courts below imposed a more rigorous standard of test validation than is required by the *EEOC Guidelines*. A review of the decisions below, however, clearly demonstrates that the courts below did not impose a more rigorous standard but simply found that the petitioners' validation study did not satisfy the minimum requirements of the *EEOC Guidelines*. The district court specifically stated that "[t]he Court does not wish to imply that it is establishing standards apart from those embodied in the EEOC Guidelines". Pet. App. C. pp. 63-64. Likewise, the Court of Appeals stated that:

> We do not think the district court was bound to find either compliance with the Guidelines or "job relatedness" in a more general sense. The Guidelines are not satisfied by just any correlation to any facet of job performance. They require close scrutiny of "the use of a single test as a sole selection device . . . when the test is valid against only one component of job performance". § 1607.5(c). The test here, and the validation study performed by defendants' expert, do not survive close scrutiny.

Pet. App. A. p. 34; See also Pet. App. A. pp. 34-37 for a detailed criticism of the validation study.

C. *The Remedial Order Entered by the District Court and Approved by the Court of Appeals Is a Constitutionally Permissible Method of Eliminating the Present Effects of Past Racial Discrimination.*

The district court found that the class of individuals represented by the N.A.A.C.P. respondents was the victim of unlawful testing and recruitment practices. In fashioning an appropriate remedy, the district court required the petitioners to authorize provisional appointments from the current eligibility list, and to rank first on the next eligibility list for permanent appointments those persons who receive provisional appointments. All persons on the next eligibility list will be certified for permanent appointment on a one-for-one basis with any Black and Spanish-surnamed person who failed a previous FFEE and who passes a valid FFEE, on a one-for-one basis with any other Black and Spanish-surnamed person who passes a valid FFEE and seeks appointment to the Boston or Springfield Fire Department, and on a three-

for-one basis with any other Black and Spanish-surnamed person who passes a valid FFEE and seeks appointment to a fire department serving a community whose minority population is more than one percent, until such time as the fire department achieves a complement of minorities commensurate with the percentage of minorities living within the community. Pet. App. C. pp. 72-73, 75.[4]

Petitioners contend that the propriety of the above relief should be reviewed by this Court because it conflicts with prior decisions of this Court, the provisions of the Fifth and Fourteenth Amendments to the United States Constitution, and the provisions of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. Pet. pp. 15-19.

The petitioners' argument assumes that the class of Black and Spanish-surnamed persons represented by the N.A.A.C.P. respondents was not the victim of unlawful racial discrimination. Their argument ignores the fact that both courts below found discrimination with respect to testing and recruitment, and that this discrimination accounts for the existence of a shocking level of minority underrepresentation in the fire departments subject to Massachusetts civil service law.

This Court has recognized that it is appropriate to consider race in order to remedy prior illegal racial discrimination. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16-17 (1971). The numerical ratios established by the district court have been sustained by the courts of appeals which have had occasion to consider the question. *Castro* v. *Beecher*, 459 F.2d 725 (1st Cir.

[4] On May 7, 1974 the district court determined that 48 of the 107 fire departments subject to Massachusetts civil service law serve areas with a Black and Spanish-surnamed population less than one percent. Nothing in the record suggests the existence of any racially balanced fire department in the Commonwealth of Massachusetts.

1972); *Bridgeport Guardians* v. *Bridgeport Civil Service Commission*, 482 F.2d 1333 (2d Cir. 1973); *Vulcan Society of New York* v. *Civil Service Commission of New York, supra*, (2d Cir.); *Erie Human Relations Commission* v. *Tullio, supra*, (3rd Cir.); *Contractors Association of Eastern Pa.* v. *Secretary of Labor*, 442 F.2d 159 (3rd Cir. 1971), *Cert. denied*, 404 U.S. 854 (1971); *Morrow* v. *Crisler*, 491 F.2d 1053 (5th Cir. *en banc* 1974), *Cert. denied*, 417 U.S. 965 (1974); *United States* v. *Carpenters, Local 169*, 457 F.2d 210 (7th Cir. 1972); *Carter* v. *Gallagher*, 452 F.2d 327 (8th Cir., *en banc*, 1971), *Cert. denied*, 406 U.S. 950 (1972); and *United States* v. *Ironworkers, Local 86, supra*, (9th Cir.).

It is noteworthy that the remedial Decree entered by the district court, which the petitioners attack as unconstitutional, was modeled on the Decree entered with the petitioners' consent in a police discrimination suit after remand from the court of appeals, *Castro* v. *Beecher, supra*, 365 F. Supp. 655, 660-662, (D. Mass. 1973). It is also worthy of mention that counsel for the petitioners recently took a position before this Court which appears to be opposed to the position they now take. See the Commonwealth's Brief in Opposition to Petition for a Writ of Certiorari in *Associated General Contractors of Mass., Inc.* v. *Altshuler, supra*. In that Brief they urged, in support of a 20% minority hiring goal on certain state-funded construction projects, that "while quotas merely to attain racial balance are forbidden, quotas to correct past discriminatory practices are not", at p. 5.

In summary, it is clear that the remedial order entered by the district court was well within its equitable discretion and it is not in conflict with precedent or the Constitution and laws of the United States.

D. *Neither This Court Nor Any of the Circuit Courts of Appeals Have Held That the Eleventh Amendment to the United States Constitution Bars the Taxation of Appellate Costs Against a State.*

Pursuant to Rule 39(a) of the Federal Rules of Appellate Procedure, the Court of Appeals below entered an Order in favor of the N.A.A.C.P. respondents, taxing the petitioners with the costs of appeal, in the sum of forty-nine dollars and fifty cents ($49.50).

Petitioners urge this Court to review that Order on the grounds that it is in conflict with this Court's ruling in *Edelman* v. *Jordan*, 415 U.S. 651 (1974), and because it is in conflict with decisions of two other Circuit Courts of Appeals. *Jordan* v. *Gilligan*, 500 F.2d 701 (6th Cir. 1974) and *Skehan* v. *Board of Trustees*, 501 F.2d 31 (3rd Cir. 1974).

The forty-nine dollars and fifty cents ($49.50) in appellate costs awarded to the N.A.A.C.P. respondents hardly involves "the payment of a very substantial amount of money" which concerned this Court in *Edelman*, *supra*, at 664. The *Edelman* case dealt not with the question of appellate costs, but with the issue of a retroactive award of state welfare benefits which this Court classified as an award of "accrued liability". In *Edelman* this Court held that such an award was barred by the Eleventh Amendment to the United States Constitution.

It appears well established that the power of an appellate court to tax court costs is to be characterized as an incident to the appeal and not within the scope of the sovereign immunity of a state. In *Fairmont Creamery Co.* v. *Minnesota*, 275 U.S. 70 (1928), this Court held that sovereign immunity did not protect the state of Minnesota against a judgment for costs of litigation before this Court on an appeal from the final judgment of

the highest court of that state. Nothing in the *Edelman* decision suggests that this Court intended to overrule the holding in the *Fairmont Creamery Co.* case. If this Court intended in the *Edelman* case to hold that Rule 39(a) of the Federal Rules of Appellate Procedure is unconstitutional, clearly it would have made this explicit.

Moreover, the two cases cited by the petitioners for the proposition that a conflict exists between the Circuits on the question of taxation of appellate costs against a state are not on point because they are limited to the issue of the taxation of attorneys' fees against the state, an issue that has not yet been ruled on below. Pet. App. E. p. 76. Petitions for a Writ of Certiorari on the question of attorneys' fees have been filed in both *Jordan* (No. 74-403) and *Skehan* (No. 74-558), and should this Court deem it appropriate to consider the question, the N.A.A.C.P. respondents submit that the issue appears to be properly raised in *Jordan* and *Skehan* but not in this case.

Conclusion

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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